IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 12 OF 2002.

M/s. Amogh Enterprises,
a partnership firm through
its partners Dilip Shripad
Prabhu Desai and Mahesh Vishnu
Angle, D-1, Shamiana Apartments,
Comba, Margao. ... Appellant.

Versus

1. Mrs. Anjali Thakran,
   B3-F2, Sapna Residency,
   Opposite Omrak Video
   Library, Margao-Colva
   Road, Per Seraulim,
   Salcete-Goa.
2. State. ... Respondents.

Mr. M.P. Almeida, Advocate for the Appellant.

Mr. Arun Bras De Sa, Advocate for the Respondent No. 1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2/State.

Coram : P.V. HARDAS, J.

Date : 11th December 2003.

ORAL JUDGMENT.

The appellant/original complainant, being aggrieved by the Judgment of the Judicial Magistrate, First Class, Margao, dated 23rd July 2003, in Criminal Case No. 372/N/99/E, acquitting the respondent no. 1/accused for an offence punishable under Section 138 of the Negotiable Instruments Act, has filed the present appeal.

2. The facts in brief, as are necessary for the decision of the appeal, are set out hereunder:-

The respondent no. 1/accused had issued to the appellant a cheque bearing no. 232396, dated 28th February 1999, for Rs. 30,000/-, drawn on the Corporation Bank, Margao Branch, towards the discharge of the bill of the appellant for carrying out certain electrical works. When the said cheque was presented for collection by the appellant/complainant, the same was returned unpaid with the endorsement 'insufficient funds'. The cheque issued by the respondent no. 1/accused is at Exhibit P.W.1/B. The memo by which the cheque was returned unpaid is at Exhibit P.W.1/C. Consequent on the dishonour of the cheque, a notice, dated 17th July 1999, was issued by the appellant at Exhibit P.W.1/D. The said notice was returned with a postal endorsement that the respondent was not residing at the said place and the present address was not known. The postal envelope and the A.D. card is at Exhibit P.W.1/E Colly. A copy of the said notice was also sent under Certificate of Posting and the certificate of posting is at Exhibit P.W.1/F. A complaint, therefore, came to be filed against the respondent no. 1/accused and the same was registered as Criminal Case No. 372/N/1999/E. The verification statement of P.W.1 Dilip Prabhu Desai, a partner of the complainant firm, came to be recorded by the learned trial Court and process was ordered to be issued against the respondent no. 1. Substance of the accusation, at Exhibit 9, was explained

to the respondent no. 1/accused, who pleaded not guilty and claimed to be tried. The complainant, in support of its case, examined P.W.1. Dilip Prabhu Desai. The respondent no. 1/accused examined herself as A.W.1 and also her husband Sanjay Thakran as A.W.2. The learned trial Judge came to the conclusion that the appellant/complainant was aware that the accused was not residing at the address at which the notice was addressed to and, therefore, since the accused was not served with a notice, no offence under Section 138 of the Negotiable Instruments Act was made out and, accordingly, acquitted the accused. Hence, the appeal.

3. P.W.1 Dilip Prabhu Desai in his examination-in-chief has stated about the electrical works carried out by the complainant company as per the request of the respondent no. 1/accused, about the presentation of the cheque, its dishonour and of sending the notice to the respondent no. 1/accused. In the cross-examination, on behalf of the respondent no. 1, P.W.1 Dilip Prabhu Desai has admitted that the cheque was presented by him for collection on 28th February 1999 in the Saraswat Bank, Margao Branch. He has further admitted that after its dishonour, on the first occasion, he brought the fact to the notice of the accused and, thereafter, waited for more than 15 days for the accused to make payment as she had requested him

not to re-deposit the cheque. According to P.W.1 Dilip Prabhu Desai, he waited till 7th July 1999 and presented the cheque again on 7th July 1999 and the same was returned unpaid on 8th July 1999. He has admitted that his statement in the complaint that he had received the cheque from the bankers on 7th July 1999 was incorrect. He has further admitted that he could not say whether the accused was residing at the given address when the registered notice was sent by him. He has denied the suggestion that the accused did not receive the notice sent by the complainant. He has further admitted that the electrical works were the only works carried out by the complainant for the accused at Sernabatim. He has also admitted 'I was told by the accused that she was staying at Sernabatim where the structure had been constructed'.

4. The accused examined herself as A.W.1. She has stated that she had issued a cheque for the electrical works done at the premises at Sernabatim. She has stated that the said cheque was given as a security. She has given the dates on which she had paid to the complainant an amount of Rs. 20,000/- towards the charges for the electrical works. In the cross-examination she has admitted that they had shifted their residence to Sapna Residency from Sernabatim. She has further admitted that the flat in Sapna Residency

was sealed on 9th July 1999 under the Orders of the Court. She has further admitted that her belongings had remained in Sapna Residency flat while leaving for Rajasthan, because the bailiff had sealed the premises.

5. A.W.2 Sanjay Thakran has also admitted in the cross-examination that he learnt that his flat in Sapna Residency was sealed on August 1999. He has also admitted in the cross-examination that he had not informed the postal authorities while leaving Sapna Residency.

6. The learned trial Court, in paragraphs 13, 14 and 15 of the Judgment, has come to the conclusion that the appellant was aware that the accused was residing at Sernabatim and, therefore, ought to have addressed the notice to the accused at Sernabatim. Since the accused was not served with the notice, the learned trial Court had acquitted the accused.

7. Mr. Almeida, the learned counsel appearing on behalf of the appellant, has urged before me that, though the notice was returned with the postal endorsement that the addressee had left and the new address was not known, the notice can be deemed to have been duly served on the accused. In support of this Mr. Almeida has placed reliance on certain authorities, to

which I shall advert shortly.

8. Mr. De Sa, the learned counsel appearing on behalf of the respondent no. 1/accused, has supported the Judgment of the learned trial Court and has urged that the appellant was aware that the accused was not residing at the address at which the notice was addressed and, therefore, the complainant/appellant ought to have addressed the notice to the accused at Sernabatim. He has further stated that this being an appeal against acquittal, this Court would not interfere merely because another view was possible.

9. Mr. Almeida, the learned counsel appearing on behalf of the appellant, has placed reliance on the Judgment of the Supreme Court in **K. Bhaskaran v. Sankaran Vaidhyan Balan and another,** 1999 (6) Scale 272. Reliance is placed particularly on the facts noted by the Apex Court in paragraph 4 of the Judgment in which it was noticed that the postal endorsement on three occasions reflected the absence of the addressee and on the fourth occasion an intimation was served on the addressee's house. As the postal article remained unclaimed, it was sent back to the sender with the endorsement 'unclaimed'. In that background, therefore, the Apex Court held that it was good service. The ratio of the Judgment of the Apex Court is not applicable to

the facts of the present case, as in the present case the notice was returned to the complainant with the endorsement that the accused had left the premises. The other decisions on which reliance is placed by Mr. Almeida, the learned counsel appearing on behalf of the appellant, are of no assistance to the appellant as the appellant in the present case was aware that the accused was not residing at the address at which the notice was sent. In the present case the appellant was also aware that the accused was residing at Sernabatim and, therefore, ought to have addressed the notice to the accused at the address at Sernabatim. Since this was not done, the benefit of deemed service of the notice cannot be extended to the appellant and it will have to be, therefore, held that the accused was not served with the notice of the dishonour of the cheque. That being the position, the complaint is not complete, as the accused was not served with the notice of dishonour of the cheque.

10. This is an appeal against acquittal and the view taken by the trial Court is a possible view taken on the basis of the record and no perversity in the reasoning thereof, has been demonstrated. The appeal is, therefore, devoid of any merit and the same deserves to be dismissed.

11. Criminal Appeal is, therefore, dismissed.

(P.V. HARDAS)
JUDGE.

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